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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 483

JOHN J. CASALE, INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 39-41) is reported in 86 F. Supp. 167.

JURISDICTION

The judgment of the court below was entered on October 3, 1949 (R. 41). A motion for a new trial was filed on October 24, 1949, and overruled on November 7, 1949 (R. 42). The petition for a writ of certiorari was filed on December 15, 1949. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255(1).

QUESTION PRESENTED

Whether the court below properly found the petitioner to be engaged in the business of transporting property for hire within the meaning of Section 3475(a) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

The applicable portions of the pertinent statute and regulations are set forth in the Appendix, *infra,* pp. 15-18.

STATEMENT

The special findings of fact of the Court of Claims (R. 34-38) may be summarized as follows:

Petitioner, a corporation with its principal place of business in New York City, is engaged in the business of owning and leasing trucks to various business firms in and near the City of New York. At present, it owns approximately 1,300 trucks which it leases to some 80 customers. To 27 of such customers it furnishes chauffeurs as well as trucks. (R. 34.)

During 1945, petitioner was furnishing trucks and drivers to certain business firms from December 18, 1945, to December 31, 1945, inclusive. Eight of these concerns paid to petitioner the aggregate amount of $4,419.71 for the petitioner's trucks and the services of the drivers furnished under contracts hereinafter referred to. The Commissioner of Internal Revenue determined that a 3% transportation of property tax in the amount of $132.59 should be collected by petitioner upon such receipts. On the ground that it was not liable under the terms

of the statute, petitioner failed and refused to make the collections or to pay the transportation tax to the Collector of Internal Revenue. (R. 34.)

Later, as a result of notice and demand for payment of the amount of the tax and the issuance of a warrant for distraint, petitioner paid the penalty tax of $132.59 (see Internal Revenue Code, Sec. 1718(c)), together with 5% penalty for late payment amounting to $6.63, and interest of $13.27, a total of $152.49 (R. 34).

Petitioner thereafter filed a timely claim for refund of the amount of $152.49 on the ground that it was not engaged in transportation of property as a carrier and that to hold that the furnishing of drivers with its trucks subjected it to the transportation of property tax was arbitrary. This claim was rejected by the Commissioner of Internal Revenue and this suit instituted in the Court of Claims within two years of such rejection. (R. 1, 34-35.)

Petitioner's dealings with its customers are covered by written contracts with each customer. These contracts, made on a standard form, refer to the petitioner as the lessor and the customer as the lessee. Each contract provides that the petitioner will acquire and keep ready for service at all times trucks of approximate capacity and body designs for that customer's business; that it will keep all vehicles duly registered, licensed, and properly equipped at its own expense; that it will maintain all trucks and replacements therefor in good condition and repair; that it will

furnish all garage, storage, and washing services, fuel, oil, lubricants, and other materials necessary to the operation of the trucks; and that it will cause all trucks to be covered by public liability insurance. Each contract further provides that petitioner's customer will use the assigned truck exclusively in the usual course of its business; will not undertake any repairs or adjustments to the truck; will not overload it, etc. Rentals of the trucks are fixed at flat weekly rates whether or not the trucks are used, plus stated fees for each mile the trucks are driven. (R. 28-31, 35.)

Where petitioner furnishes to the customer a chauffeur, there is appended to the written contract a Schedule "B" defining such relationship. Such Schedule "B" for six of the concerns [1] involved is in substantially the following words and figures (R. 35-37):

> The Lessor agrees to provide chauffeurs (and helpers if required) for all vehicles leased under this agreement and all clauses otherwise in this agreement referring to "Lessee's Chauffeurs" etc. shall be deemed amended to read and mean "Lessor's Chauffeurs" etc.
>
> The Lessor agrees to pay the wages of such chauffeurs and helpers at the union wage scale or scales prevailing at any time this Schedule may be in force. The Lessor will also pay any and all contributions or taxes for Unemploy-

[1] For two of the other customers, a schedule similar to Schedule "B," but in a slightly shorter form, was used (R. 37).

ment Insurance and for Old Age Benefits now in effect or hereafter in effect which may be imposed by the United States or State Government or Governments which may be measured by wages, salary or other remuneration paid to such employees. The Lessor shall also be liable solely and fully for the expense of Workmen's Compensation Insurance and will, upon request, furnish satisfactory evidence that such compensation insurance is duly provided for as required by law.

At all times when the said motor vehicle or vehicles are in the service of the Lessee and notwithstanding any chauffeur or helper shall be provided by the Lessor, the operation of the said vehicle or vehicles including the activities of such employees shall be under the sole direction and control of the Lessee.

The Lessee herewith agrees to hold the Lessor harmless for the following acts of such employees:

A. Breakage, damage, spoilage, loss or theft of merchandise, including improper or erroneous delivery thereof;

B. Damage resulting from installation of merchandise or to property at the place of delivery or pick-up thereof;

C. The Lessor assumes no liability or responsibility for any cash, checks or funds entrusted to any such employees and the safety of same shall be solely the responsibility of the Lessee, whether such cash, checks or funds are in the actual possession of such employees or whether such employees temporarily de-

posit the same for safekeeping with any one or in any place of storage provided by the Lessor, it being understood that such place of storage, if provided, shall be solely for the convenience and accommodation of the Lessee, without any compensation being paid therefor.

Upon receipt of a written complaint from the Lessee specifying any reckless, careless or abusive handling of a vehicle or any other incompetence of any such chauffeur or helper the Lessor shall remove such chauffeur or helper and substitute a competent one in his place.

Inability on the part of the Lessor to provide chauffeurs and/or helpers required shall in (gn) wise vitiate this agreement nor shall the Lessor incur any liability for such failure to provide.

In consideration of the provisions of this Schedule the Lessee agrees to pay to the Lessor separately and in addition to the rental provided in Schedule "A" of this agreement an amount equal to the wages paid by the Lessor to such chauffeurs (and helpers if required) plus 8 per cent thereof, such separate and additional compensation to be paid by the Lessee to the Lessor weekly. If, however, at any time when this Schedule shall be in force, there shall occur an increase or reduction, as compared with the date of this agreement in the required rate of contributions or taxes payable by the Lessor for Unemployment Insurance and for Old Age Benefits referred to hereinabove the amount of this separate and addi-

> tional compensation to be paid by the Lessee to the Lessor shall be reduced or increased, as the case may be, substantially in the same amount as such operating expenses of the Lessor are so reduced or increased on that account.

In order to service and house the trucks, petitioner maintains at locations in and around the City of New York convenient to the customers, 32 garages. Except in special instances, the trucks are returned at night to petitioner's garages. (R. 37.)

Where chauffeurs are furnished, they are carried on petitioner's pay roll and are paid by petitioner. The trucks which petitioner furnishes to its customers bear the customer's markings and not those of the petitioner, and where the chauffeurs are furnished by the petitioner, they wear the uniforms of the customers. (R. 37.)

In the case of chauffeurs, their time is measured by time clocks in petitioner's garages from the time the trucks and chauffeurs leave until the chauffeurs return the trucks. The amounts so paid to such chauffeurs are then billed to the customers with the addition of the percentage specified in Schedule "B." (R. 37-38.)

For the most part, the chauffeurs employed by petitioner and furnished to its customers were formerly employed by the respective customers. All of them are subject to the jurisdiction of unions. These unions contract with petitioner as the employer with reference to the pay schedules

of the chauffeurs and other conditions of their employment. The chauffeurs are given physical examinations and if necessary are instructed in matters requisite to their obtaining licenses as chauffeurs. They are given no written contracts or general orders by the petitioner as to the performance of any duties in petitioner's interest while under the direction of the customers. (R. 38.)

Petitioner is registered with the New York State Unemployment Office as the employer of the chauffeurs furnished to its customers. Petitioner has not been licensed to transport property for hire by any governmental agency, state or federal. (R. 38.)

Upon the foregoing facts, the Court of Claims held that petitioner was engaged in transporting property for hire and was subject to the 3% tax imposed by Section 3475(a) of the Internal Revenue Code. It therefore held that petitioner was not entitled to any refund of tax and dismissed the petition.

ARGUMENT

1. The only question involved is whether petitioner, in furnishing trucks and drivers to customers for delivery service, was engaged in the transportation of property within the meaning of Section 3475 of the Internal Revenue Code, Appendix, *infra,* pp. 15-16. Petitioner owned, registered, and garaged the trucks, kept them serviced and repaired, furnished fuel for them, employed and

furnished drivers and paid their wages as well as the pay roll taxes and workmen's compensation premiums incident thereto. Petitioner required the drivers to report to one of its garages at the beginning and end of each working day. It directed the drivers with their trucks to report to designated customers and, during that period, the drivers were instructed to follow the orders of the designated customers with respect to such items as where to go, where to pick up, and what to deliver. At the end of the day, the drivers were required to return the trucks to petitioner's garages and to check them in. Petitioner hired the drivers and contracted with the unions concerning their wages, working hours, vacations, etc., and the unions recognized petitioner as the "employer." Petitioner was also registered with the New York State Unemployment Office as the employer of these drivers. Petitioner had the right to both hire and discharge the drivers.[2] On the basis of such facts as these, the Court of Claims held that the petitioner was engaged in the transportation of property for hire and was therefore required to collect the tax imposed by Section 3475 of the Internal Revenue Code.

The court below was correct in so holding. It is plain that there is no substantial difference be-

[2] The only provision in the contract between the petitioner and its customers, giving the lessee any right as to the discharge of a driver, is that the lessor shall remove the chauffeur and substitute a competent one in his place upon receipt of a written complaint from the lessee.

tween the services rendered by petitioner to its customers where both trucks and drivers were furnished and those which would have been furnished to the customers by an admitted public carrier of property, such as a pick-up and delivery drayage company.

2. The contention that the court's ultimate findings of fact are contrary to its special findings of fact is without merit. The court's ultimate finding that the petitioner was engaged in the business of transporting property for hire is fully supported by the evidentiary findings (R. 35-38). Petitioner attacks the ultimate finding that it was engaged in the business of transporting property for hire as being in conflict with the statement in the special findings of fact (R. 34) that the petitioner was engaged in the business of owning and leasing trucks. But these two statements are not conflicting. A corporation may be engaged in the business of owning and leasing trucks and using those trucks in such a manner as also to be transporting property for hire even though the latter activity forms only a small part of its business. In *Bridge Auto Renting Corp.* v. *Pedrick,* 174 F. 2d 733 (C.A. 2d) only 10% of the income of the corporation there involved was received from the furnishing of trucks and drivers; nevertheless the court held that as to that 10%, the corporation was subject to the transportation tax.

Nor is the statement in the court's opinion that the drivers furnished to the customers were peti-

tioner's employees contrary to anything in the special findings of fact. Since the facts as set forth in the court's findings (R. 34-38), which petitioner does not dispute, clearly establish that the ultimate decision of the court is correct, petitioner's complaint is baseless.[3]

3. Petitioner states that the decision below, holding that the drivers are employees of the petitioner, is in conflict with certain decisions of this Court. It takes the position that the drivers were employees of the customers and, in order to support this position, lays great stress on the fact that, during the time they were delivering goods, the drivers were under the direction of the customers, the lessees. But the petitioner had the right to hire, fire, and substitute other drivers. The petitioner was recognized by the unions as the employer and it was responsible for the payment of all wages and for the payment of all social security taxes. The drivers were primarily under the petitioner's control and the delegation of a certain amount of such control to the lessees, giving them the right to direct the drivers while delivering goods, is not sufficient to establish that the drivers were the employees of the lessees. The decisions

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[3] In the case of *United States* v. *Wells*, 283 U. S. 102, where the ultimate conclusion of the Court of Claims that the transfer was in contemplation of death was set forth in the court's opinion rather than in its finding of fact, but was in accord with the evidentiary facts, this Court stated that the absence of an ultimate finding to that effect did not require a reversal of the judgment.

of this Court in *United States* v. *Silk,* 331 U. S. 704, and *Bartels* v. *Birmingham,* 332 U. S. 126, relied upon by petitioner, in reality support the conclusion of the court below. For in the *Bartels* case, this Court, in referring to its decision in the *Silk* case, pointed out that the relationship of employer-employee is not to be determined solely by the amount of control exercised by the employer, but that other factors, such as the permanency of the relationship, the skill required, the investment in facilities for work, and opportunities for profit or loss from the activities, should be considered. In short, said this Court (p. 130), "It is the total situation that controls." Considering the total situation here, it is clear that the drivers are petitioner's employees and not the customers'.

There is no conflict with the decisions of this Court in *United States* v. *Rosenblum Truck Lines,* 315 U. S. 50, and *Thomson* v. *United States,* 321 U. S. 19. Those cases involved a determination of whether, under certain provisions of the Interstate Commerce Act, the companies involved were entitled to benefits under the provision in that Act known as the "grandfather" clause. The decisions in them clearly have no application here. The case of *Walling* v. *John J. Casale, Inc.,* 51 F. Supp. 520 (S.D. N.Y.), also cited by petitioner as in conflict, involved a different question and the court's statement that the defendant there (the same corporation as the petitioner here) is not a common carrier of property for hire has no neces-

sary relevance here and was, in any event, dicta. The actual decision of the court in that case, holding that since John J. Casale, Inc., owned the trucks which engaged in a substantial amount of business in interstate commerce by delivering goods for the customers, its employees were performing duties in interstate commerce within the meaning of the Fair Labor Standards Act of 1938, is in substantial accord with the holding of the Court of Claims in this case.[4]

4. As already indicated, the decision below is in accord with that of the Court of Appeals for the Second Circuit in *Bridge Auto Renting Corp.* v. *Pedrick,* 174 F. 2d 733. See also *Motor Haulage Co.* v. *United States,* 70 F. Supp. 17 (E.D. N.Y.), affirmed *per curiam,* 331 U. S. 784. The facts in the two cases are almost identical and petitioner's attempt to distinguish the two (Pet. 25-27) is not convincing. The statement on page 25 of the petition that there was no provision in that case that the chauffeur or driver "shall be under the sole direction and control of the Lessee," as provided in Schedule "B" of the leases herein, is misleading. In the *Bridge Auto Renting* case the opinion of the Court of Appeals shows that in certain of the contracts it was provided that (p. 735) "you,"

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[4] Other district court decisions cited by the petitioner are distinguishable on their facts. In any event a conflict between the decision of the court below and that of a district court is, of course, not ground for certiorari.

meaning the lessee, "shall have exclusive control and direction over" the drivers.

That case serves also as a basis for putting aside the petitioner's asserted fear that to allow the decision below to stand is to compel it to change completely its methods of doing business (Pet. 28). For it was there stated that subjection of a corporation to the tax here in question does not require a decision that it is a contract carrier (174 F. 2d 733, 737):

> The question is whether what it actually did pursuant to the various terms of the agreements it made and performed adds up to enough to be substantially what is done by a person hired and paid to transport property by truck.

CONCLUSION

The decision of the court below is correct and there is no conflict. The petition should be denied.

Respectfully submitted,

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FEBRUARY, 1950.

APPENDIX

Internal Revenue Code:

SEC. 3475 [as added by the Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 620]. TRANSPORTATION OF PROPERTY.

(a) *Tax.*—There shall be imposed upon the amount paid within the United States after the effective date of this section for the transportation, on or after such effective date, of property by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per centum of the amount so paid, except that, in the case of coal, the rate of tax shall be 4 cents per short ton. Such tax shall apply only to amounts paid to a person engaged in the business of transporting property for hire, including amounts paid to a freight forwarder, express company, or similar person, but not including amounts paid by a freight forwarder, express company, or similar person for transportation with respect to which a tax has previously been paid under this section. * * *

* * *

(c) *Returns and Payment.*—The tax imposed by this section shall be paid by the person making the payment subject to the tax. Each person receiving any payment specified in subsection (a) shall collect the amount of the tax imposed from the person making such payment, and shall, on or before the last day of each month, make a return, under oath, for the preceding month, and pay the taxes so

collected to the collector in the district in which his principal place of business is located, * * * .

* * *

(e) *Registration.*—Every person engaged in the business of transporting property for hire, including freight forwarders, express companies, and similar persons, shall, on or before the sixtieth day after the effective date of this section, or within sixty days after first engaging in the business of transportation of property for hire, register his name and his place or places of business with the collector in the district in which is located the principal place of business of such person. Every such person who fails to register within the period specified shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $50.

(26 U.S.C. 1946 ed., Sec. 3475.)

Treasury Regulations 113 (1943 ed.):

SEC. 143.1. *Meaning of Terms.*—As used in these regulations, unless otherwise specified or indicated by the context—

(*a*) *General.*—The terms defined in the applicable provisions of law shall have the meanings so assigned to them.

(*b*) *Person engaged in the business of transporting property for hire.*—The term "person engaged in the business of transporting property for hire" includes a common carrier, contract carrier, local moving or drayage concern, freight forwarder, express company, or

other person transporting property for hire wholly or in part by rail, motor vehicle, water, or air.

(*c*) *Carrier.*—The term "carrier" is coextensive with the term "person engaged in the business of transporting property for hire."

(*d*) *Transportation.*—The term "transportation" as used herein means the movement of property by a person engaged in the business of transporting property for hire, including interstate, intrastate, and intracity or other local movements, as well as towing, ferrying, switching, etc. In general, it includes accessorial services furnished in connection with a transportation movement, such as loading, unloading, blocking and staking, elevation, transfer in transit, ventilation, refrigeration, icing, storage, demurrage, lighterage, trimming of cargo in vessels, wharfage, handling, feeding and watering live stock, and similar services and facilities.

* * *

SEC. 143.11. *Scope of Tax.*—Section 3475 (*a*) imposes a tax upon amounts paid within the United States after December 1, 1942, to a person engaged in the business of transporting property for hire, for transportation, originating on or after such date, of property by rail, motor vehicle, water, or air from one point in the United States to another.

SEC. 143.13. *Application of Tax.*—(*a*) *In general.*—The tax is payable by the person making the taxable transportation payment

and is collectible by the person receiving such payment. (See section 143.50.)

* * *

The tax applies to any payment, not specifically exempted, for the transportation of property, made to a person engaged in the business of transporting property for hire, including a payment made by one such person to another, but not including an amount paid by a carrier, a freight forwarder, express company, or similar person for transportation with respect to which a tax is payable to such person.

* * *

SEC. 143.50. *Duty to Collect, Return, and Pay Tax.*—Every person receiving any taxable payment for the transportation of property must collect the tax from the person making such payment at the time the payment is made.

SEC. 143.55. *Refusal to Pay Taxes.*—If a person to whom taxable transportation service is furnished refuses to pay the tax imposed thereon, or if for any reason it is impossible for the collecting agency to collect the tax from such person, the collecting agency should report to the collector of internal revenue for the district in which its returns are filed the name and address of such person, the nature of the service rendered, the amount paid for such service, and the date on which paid. * * *

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